

PRIVY COUNCIL REPORTS

KEPPEL BUS COMPANY LTD. v.
SA'AD BIN AHMAD[P.C. (Lord Cross of Chelsea, Lord Kilbrandon,
Sir Harry Gibbs) May 15, 1974]
[Privy Council Appeal No. 1 of 1973]*Tort — Assault — Claim for damages — Master and servant — Whether tortious act done in the course of employment.*

The respondent was assaulted by a servant of the appellant company. At the relevant time when the act was committed, the respondent was a passenger in a bus belonging to the appellants and the servant was the conductor of that bus. There had been an argument between the conductor and the respondent and subsequently the conductor struck the respondent's glasses, breaking them and causing the respondent to lose his eye. There was no evidence to show an emergency situation calling for forcible action on the part of the conductor. There was no evidence of disorder among the passengers of the bus. The question in the case was whether the conductor did what he did "in the course of his employment." The trial judge specifically rejected the conductor's version of the incident, gave judgment in favour of the respondent and the Court of Appeal dismissed the appeal by the appellant company ([1972] 2 M.L.J. 121). The company appealed to the Privy Council. The conductor was not a party to the proceedings before the Court of Appeal or to the present appeal.

Held: there was no evidence which would justify the ascription of the act of the conductor to any authority, express or implied, vested in him by the appellants. There was therefore no legal ground for holding that the facts of this case justify a departure from the ordinary rule of *culpa tenet suos auctores*.

Cases referred to:-

- (1) *Poland v. John Parr & Sons* [1927] 1 K.B. 236.
- (2) *C.P.R. v. Lockhart* [1942] A.C. 591.
- (3) *Baker v. Snell* [1908] 2 K.B. 352.
- (4) *Riddell v. Glasgow Corporation* [1911] S.C. (H.L.) 35.
- (5) *Bank of New South Wales v. Owston* [1879] 4 App. Cas. 270.
- (6) *Daniels v. Whetstone Entertainments Ltd.* [1962] 2 Lloyd's Rep. 1.
- (7) *Warren v. Henly's Ltd.* [1948] 2 All E.R. 935.
- (8) *Deatons Pty. Ltd. v. Flew* [1949] 79 C.L.R. 370.
- (9) *Petterson v. Royal Oak Hotel* [1948] N.Z.L.R. 136.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

J. G. Le Quesne, Q.C. and *Kenneth Hilborne* for the appellants.

G. O. Kellock, Q.C. and *Ian Baillieu* for the respondent.

Lord Kilbrandon (delivering the judgment of the Board): The respondent (plaintiff) was a passenger in a bus belonging to the appellants (first defendants). They employed as conductor of the bus the second defendant, who was a party neither to the proceedings before the Court of Appeal in Singapore nor to the present appeal. In the course of his journey the respondent was assaulted by the conductor. He brought an action claiming damages against both the conductor and also the appellants, as vicariously liable for the wrong committed by their servant. Kulasekaram J., before whom the case was tried, decided for the respondent against both defendants, and assessed the damages at \$20,290. The Court of Appeal dismissed the appeal of the first defendants, and gave leave to appeal to the Board.

The facts, as they were found by the learned judge, may be stated as follows. At one point on the journey,

- A** an elderly Malay lady indicated that she wanted to get off the bus. The conductor ordered her "in a loud and rude manner" to go and wait near the exit. The respondent took exception to this instruction and the manner in which it was given; he remonstrated that it was not safe for the lady to stand by the exit, which was also the entrance. An altercation broke out between him and the conductor, in the course of which each tried to hit the other. The passengers intervened and separated them. The bus stopped, the lady got off, and some passengers got on. The conductor began collecting fares. As he did so he abused the respondent in Chinese, using a very rude expression, of which an English translation has not been furnished. The respondent stood up and asked the conductor not to use abusive language; he then sat down. After he had sat down the conductor struck him in the eye with the ticket-punch, breaking his glasses, and causing the loss of the sight of the eye. The learned judge specifically rejected the conductor's version that the ticket-punch accidentally struck the glasses. The learned judge's account of these facts was accepted by the Court of Appeal; there are therefore concurrent findings of these facts, which, in accordance with their usual practice, their Lordships would not review.

- The question in the case is whether the conductor did what he did "in the course of his employment". The course of the employment is not limited to the obligations which lie on an employee in virtue of his contract of service. It extends to acts done on the implied authority of the master. In *Poland v. John Parr & Sons*⁽¹⁾ a carter, who had handed over his wagon and was going home to his dinner, struck a boy whom he suspected, wrongly but on reasonable grounds, of stealing his master's property. The master was held liable for the consequences, since a servant has implied authority, at least in an emergency, to protect his master's property.

- "Maybe his action was mistaken and maybe the force he used was excessive; he might have pushed the boy instead of striking him. But that was merely acting in excess of what was necessary in doing an act which he was authorized to do. The excess was not sufficient to take the act out of the class of authorized acts" — *per* Scrutton L.J. at p. 244.

- G** There is no dispute about the law. The Court of Appeal relied on the well-known passage from *Salmond on Torts* which was approved in *C.P.R. v. Lockhart*⁽²⁾ on page 599; it is not necessary to repeat it.

- The Court of Appeal rightly point out that the question in every case is whether on the facts the act done, albeit unauthorised and unlawful, is done in the course of the employment; that question is itself a question of fact. In *Baker v. Snell*⁽³⁾ (approved [1908] 2 K.B. 825), Channell J., after saying that the defendant's liability would depend on whether his servant's wrongful act was done in the course of his employment, went on, "the question is one of fact which ought to have been left to the jury." A jury, however, would be entitled to find that the act was done in the course of the employment only if there were facts proved which established the extent of the master's delegated authority, express or implied, and that the servant's act was done under that authority, as part of his duty to his employer. In *Riddell v. Glasgow Corporation*⁽⁴⁾ it was alleged that a rate-collector had

defamed the appellant by charging her with forging a receipt, and that the Corporation, his employers, were vicariously liable. The question was whether the pleadings disclosed a relevant case. Lord Atkinson observed at page 36.

"There is nothing, in my opinion, on the face of the pleadings to show expressly or by implication that Gilmour was clothed with authority to express on behalf of the Corporation to ratepayers any opinion he might form on the genuineness of any receipts which might be produced to him for payment of rates;... it was not shown by the pursuer's pleadings, as I think it should be, that the expression of such an opinion was within the scope of Gilmour's employment; from which it follows, on the authorities, that the Corporation are not responsible for a slander uttered by him in the expression of that opinion."

It is necessary, accordingly, in the present appeal to examine the grounds upon which the learned judge held that, on the facts, this assault was committed in the course of carrying out, by a wrong mode, work which the conductor was expressly or impliedly authorised and therefore employed to do, and to see whether there is any evidence to support them. If there be no evidence, it is matter of law that his conclusions could not stand. The passage in which those grounds are stated is as follows:

"I find that the conductor when he hit the plaintiff was acting in the course of his duties. He was then maintaining order among the passengers in the bus. He was in effect telling the plaintiff by his act not to interfere with him in his due performance of his duties. He may have acted in a very high handed manner but nonetheless I am of the opinion that he was acting in the due performance of his duties then."

Upon the facts as found by the learned judge, and after examining, with the assistance of learned counsel, the testimony of those witnesses whom the judge accepted as credible, their Lordships are unable to find any evidence which, if it had been under the consideration of a jury, could have supported a verdict for the plaintiff. It may be accepted that the keeping of order among the passengers is part of the duties of a conductor. But there was no evidence of disorder among the passengers at the time of the assault. The only sign of disorder was that the conductor had gratuitously insulted the plaintiff, and the plaintiff had asked him in an orderly manner not to do it again. Their Lordships do not consider the question whether the events of that morning are to be regarded as one incident, or as two incidents separated by a gap, to be of much importance. Certainly the end result can be related back to the treatment of the Malay lady; on the other hand she had by now left the bus, normalcy had been restored, except, apparently, for some simmering resentment in the conductor which caused him to misbehave himself. But to describe what he did in these circumstances as an act of quelling disorder seems to their Lordships to be impossible on the evidence; on the story as a whole, if any one was keeping order in the bus it was the passengers. The evidence falls far short of establishing an implied authority to take violent action where none was called for. In *Bank of New South Wales v. Owston*,⁽⁵⁾ where the question was whether a bank manager was within his authority in bringing a criminal charge, Sir Montague Smith observed at page 290, in relation to evidence that such an action might be taken in an emergency,

"An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a

A limited one and before it can arise a state of facts must exist which shews such exigency is present, or from which it might reasonably be supposed to be present."

Their Lordships are of opinion that no facts have been proved from which it could be properly inferred that there was present in that bus an emergency situation, calling for forcible action, justifiable upon any express or implied authority, with which the appellants could be said on the evidence to have clothed the conductor.

B A similar criticism can be levelled at the second ground upon which the learned judge found that the conductor was acting under authority. There is no evidence that the plaintiff was interfering with the conductor in his due performance of his duty. His interference, if so it could be described, was a protest against the conductor's insulting language. Insults to passengers are not part of the due performance of a conductor's duty, as the learned judge seems to recognise in the paragraph of his judgment which follows.

D The function of a bus conductor, from which could be deduced the scope of the authority committed to him, was attractively put by counsel for the respondent as "managing the bus"; it was said that what he did arose out of that power and duty of management. But this concept, it seems, if pushed to its extreme, could serve to bring anything which the conductor did during his employment within the class of things done in the course of it. There must be room for some distinction between the acts of a manager, however foreign to his authority, and acts of management, properly so called. Probably this way of putting the case is fundamentally no different from that which the learned trial judge adopted and their Lordships reject, because there is no evidence of circumstances which would suggest that what the manager actually did was, although wrongful, within the scope of his authority, express or implied, and thus an act of management.

Although each case on this branch of the law must stand upon its own facts, it was natural and proper that their Lordships should have been referred to other cases by way of analogy. There is no difficulty about *Daniels v. Whetstone Entertainments Ltd.*,⁽⁶⁾ in that case an assault was committed by a servant in circumstances which showed not a possibly excessive exercise of implied authority but, as Davies L.J. pointed out at page 8, a contumacious repudiation of a direct order. In *Warren v. Henly's Ltd.*⁽⁷⁾ the master's business with the plaintiff, which had been transacted by the servant, was long over when the servant assaulted the plaintiff. As regards the two public-house cases cited, *Deatons Pty. Ltd. v. Flew*⁽⁸⁾ and *Petterson v. Royal Oak Hotel*,⁽⁹⁾ their Lordships have some difficulty in reconciling them, except on the possible ground that while in both the servant was retaliating for a personal affront, in the latter, though not the former, he was also encouraging the undesirable he assaulted to leave the premises. If either of those cases assist, by analogy, the present, it would seem that more assistance might be obtained from the former.

I A question which does not appear to have been argued below is whether, supposing that implied authority had been proved, there was not here that ex-

cessive violence which Scrutton L.J. (*supra*) held might pass beyond the description of an unauthorised mode of doing an impliedly authorised act. Their Lordships do not find it necessary to consider the point. They conclude that there was no evidence which would justify the ascription of the act of the conductor to any authority, express or implied, vested in him by his employers; there is, accordingly, no legal ground for holding that the facts of this case justify a departure from the ordinary rule of *culpa tenet suos auctores*.

Their Lordships will therefore allow the appeal, set aside the order of the Court of Appeal and also set aside the judgment of the trial judge in so far as it was a judgment against the appellants. The respondent must pay the costs of the appellants before the trial judge, in the Court of Appeal and before their Lordships.

Appeal allowed.

Solicitors: *Coward Chance; Le Brasseur & Oakley.*

HITAM BIN ABDULLAH & ANOR. v. KOK FOONG YEE (f) & ANOR.

[P.C. (Lord Wilberforce, Lord Diplock, Lord Cross of
Chelsea, Lord Kilbrandon, Sir Harry Gibbs) May 20, 1974]
[Privy Council Appeal No. 5 of 1973]

*Negligence — Motor accident — Rejection of evidence of
eye-witnesses — Inferences drawn by trial judge — Concurrent
findings of lower courts on facts — Interference.*

The trial judge made certain inferences of fact in relation to the respective vehicles involved in the motor accident which gave rise to this case. Judgment which was given for the respondents was upheld by the Federal Court. There were some differences between the reasons given by the trial judge and those given by the Federal Court. Before the Board counsel sought to show that there was no evidence to support the findings of the lower courts.

Held: (1) as there was evidence to support the inferences drawn by the trial judge it was not proper for their Lordships to review the evidence with a view to considering whether the concurrent findings were correct;

(2) there was no reason to depart from the established rule that their Lordships' Board will decline to interfere on a pure question of fact.

Case referred to:-

(1) *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Robert Alexander Q.C. and Roger Buckley for the appellants.

Ian Baillieu and David Tay for the respondents.

Sir Harry Gibbs (delivering judgment of the Board): This is an appeal from a judgment and order of the Federal Court of Malaysia which dismissed an appeal from a judgment given by the High Court in Malaya in favour of the present respondents. The action was brought on behalf of the estate and dependants of Cheong Chok Heng ("the deceased") who sustained fatal injuries when a motor car which he was driving collided with a lorry driven by the first appellant as servant or agent of the second appellant. The only issues at the trial were whether the collision had been

A caused by the negligence of the first appellant, and if so, whether the deceased had been contributorily negligent. The High Court answered the first question in the affirmative and the second in the negative and the Federal Court on appeal reached the same conclusions.

The collision occurred at about 2 o'clock in the afternoon on a roadway between Kuantan and Kemaman. The first appellant, who was driving the lorry in the direction of Kuantan, had rounded a right-hand bend and had driven for some distance along a straight stretch of road before his vehicle collided with the deceased's motor car which had been proceeding in the opposite direction. The photographs tendered in evidence show that each vehicle was damaged on its off-side at the front. The only direct evidence as to the occurrence was given by the first appellant and by another person who had been a passenger in the lorry. They asserted that the brakes of the lorry had been applied and the lorry had been stopped before the collision and that the collision was caused because the deceased drove his car on the wrong side of the road. D Two other witnesses, both of whom were lorry drivers and acquaintances of the first appellant, said that they had seen the deceased driving in an erratic and dangerous manner before the collision occurred. However, the trial judge placed no reliance on any of this evidence. He did not accept the testimony of the first appellant and his passenger as to the manner in which the lorry had been driven or as to the position of the car, and he regarded the evidence of the other two witnesses as probably fabricated and as in any case not of assistance in relation to the question whether the deceased had been at fault immediately before the collision. His conclusions that the first appellant had been negligent and that the deceased had not been guilty of contributory negligence were based on the evidence of an Inspector of Police who visited the scene of the accident some time afterwards, and particularly on a sketch plan drawn by the Inspector which showed the position of the vehicles after the collision, the tyre marks seen on and near the roadway and two heaps of fragments of glass found in the vicinity, one on the roadway and the other on the grass verge beside it on the right-hand side having regard to the direction in which the lorry was proceeding.

The trial judge found that some tyre marks, shown on the plan as A.1-A.3, A.4-A.5 and B.1-B.2, were made by the lorry. He considered that mark A.1-A.3, which was partly on the roadway and partly on the grass verge to the left of it, showed that the first appellant had driven at great speed and had lost control of the lorry when negotiating the bend. Marks A.4-A.5 and B.1-B.2 were admitted by the appellants to have been made by the lorry and clearly showed that at the time of the collision the lorry was being driven over the crown of the road so that its off-side encroached on to its wrong side of the roadway. There were some further marks, C.1 and C.2, which the judge found "could only have been caused by the offside wheels of the car" and which, if so caused, showed that the car was on its correct side of the road immediately before the collision. The judge accordingly found that at the time of the collision, the car was well on its correct side of the road. He appears to have considered that the glass on the roadway marked the